Supreme Court, U. S.
FILED
DEC 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

THE SUPREME COURT OF THE UNITED STATES

No. 79-894

October Term, 1979

JAMES A. PARKER,

Appellants,

v.

THE STATE OF TEXAS,

Appellees.

On appeal from the
Texas Court of Criminal Appeals,
Austin, Texas

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

James A. Parker, Petitioner	(	
V.	(	Appeal from Dallas, Dallas County, Texas
The State of Texas Respondent	(	

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Petitioner was convicted November 19, 1976 in the 204th Criminal Court, Dallas County, Texas and appealed to the Texas Court of Criminal Appeals, Austin, Texas. Oral arguments were scheduled and argued by the State on Petitioner's appeal on the morning of February 6, 1979 and the Appeals Court Opinion was delivered the following March 14, 1979. The Petitioner's Motion for Rehearing, Cause Number 56,543 was denied May 16, 1979 and his Motion to Recall Mandate was denied May 21, 1979.

QUESTIONS PRESENTED

The questions presented by the appeal were that the Petitioner's wife had been the individual who had signed a car rental contract with a car dealer while the Petitioner's own vehicle was in the repair shop, and there had been no agreement as to the terms. And that the trial court had denied a tape recording of a telephonic conversation between the Petitioner and the State's key witness relative the understandings reached concerning the rental car. The other question presented was that this key witness had perjuried himself and the question was raised concerning comments made by the prosecutors to the jury during the trial. It was brought up in the appeal that the Petitioner did not have legal representation during the trial.

STATEMENT OF THE CASE

In 1975, the Petitioner was preparing to run for Sheriff of Dallas County, Texas and it was during this period of time, he rented a rental car from Mohr Chevrolet, Dallas due to his own Camaro having been wrecked. Subsequently, a total of three indictments were handed down by the Dallas County Grand Jury, from complaints by Earl Williams of car theft and theft of services, and a complaint by the son of Mr. Mohr of Mohr Chevrolet, also complaining of theft of service stemming from Petitioner's rental of Mohr's rental car.

The Earl Williams car theft indictment was set for trial January 26, 1976, and Petitioner was instructed to appear in court ready to go to trial. His attorney had withdrawn and returned the retainer. Petitioner appeared, with his files as ordered, was arrested just outside the courtroom itself, his defense files were seized by agents of his political opponent, all in plain view of some of Petitioner's subpoenaed witness' who had begun to show up for the trial. Bond was set at $1500.00 by a Judge, Petitioner was placed in the county jail, but before he could be released, he was forced to pay an additional $1000.00 to the Sheriff - above and beyond what the Judge had ordered. Once the extortion was paid, Petitioner was released from jail with most of his defense files, but minus the $1000.00, which he hasn't seen since.

The trial itself occurred the week of November 15, 1976 on the "son of Mr. Mohr" complaint. This individual did not appear at said trial, and the two complaints by Earl Williams were dismissed. Understandably, Petitioner was afraid to enter the courtroom with his evidence not already seized by his political opponent, so he appeared empty handed, and brought his partial file into the courtroom the second day. Petitioner was being warned, on and off the record, that other charges and arrests were forthcoming. Indeed a local bank had charged through sworn affidavit filed in another court, that Petitioner had committed theft by conversion involving an alleged pick-up truck theft. It has since been determined by a United States District Court, that a conversion did take place, but that the bank was the converter. Petitioner was being warned that yet another car dealer was preparing felony charges against him, for some unspecified crime, and these warnings put together were sufficient, along with the previous defense file seizure, to frighten and scare Petitioner into leaving his tape recordings of the State's key witness in a safe place, outside the courtroom. At one point, Petitioner requested from the local F.B.I. Office, that they assist in bringing into the county courthouse, and into the courtroom itself, certain key evidence including telephonic conversations recorded of the State's key witness. But the F.B.I. was reluctant to enter at that stage.

Prior to the Motion for New Trial, Petitioner was advised by counsel to submit a polygraph exam of the relevant issues, and transcribe one of the conversations recorded of the State's key witness, Earl Williams. The polygraph reflected no deception on the part of Petitioner, but was not used in the Motion for New Trial or in the appeal. However, the recording transcript was submitted at the hearing on the Motion and later filed with the appeals court. In all probability, the polygraph exam results, which favored Petitioner, would have been brought up at the oral argument hearing in the Texas Court of Criminal Appeals, by his counsel. Said hearing was scheduled February 6, 1979.

A few days prior to the hearing, Petitioner's counsel advised him to forward funds, to his home, so that he may appear and argue Petitioners cause, but at that tima a forger had drawn out every dime in Petitioner's checking account - nearly $800.00. Also at this point in time, Petitioner's counsel had in fact been sworn in as a judge. And the rules laid down by the Texas Supreme Court clearly stipulate that judges cannot practice law, especially while receiving money to do so. Petitioner was put in the position, with ten years of his liberty at stake, of not having effective counsel - all the while being led to believe, he did have counsel.

An important issue at the trial, was whether or not Earl Williams, the shop manager of Mohr Chevrolet and the complaintant in the first two indictments against the Petitioner, had represented to Petitioner that the repairs to his Camaro, being held by Mohr at the time, would run as high as "$1400.00." The Camaro was insured, but the insurance company steadfastly refused to pay more than a little over $600.00. With the prospect of having to pay $800.00 or more out of his own pocket, for repairs to a vehicle a month old and fully insured to cover such damage; naturally the Petitioner declined to authorize repairs under those conditions. Subsequent to the conviction of the Petitioner, it was discovered that documents had been submitted for jury consideration depicting the costs of the completed repairs nowhere in the neighborhood of the "$1400.00," but $131.00 higher than the insurance company was prepared to pay. But these documents, photocopied and turned over to Petitioner by the Clerks Office of the appeals court, were not submitted during the trial for cross-examination. In all probability, this crucial issue would have been raised by Petitioner's counsel at the oral argument hearing in the appeals court.

Petitioner was being advised prior to the conviction being affirmed by the appeals court, that the Statement of Facts had to be agreed upon by the Petitioner and the prosecutor, relative to the correctness. In some instances, an entire sentence was deleted of comments to the jury by the prosecutors. There was the issue of a prospective juror, who had not been questioned, managing to be selected as a juror. Attempts by the Petitioner, and presumeably by his counsel at the time, to arrange for a meeting to view the tape recording of the jury selection and portions of the trial, were in vain. And in all probability, Petitioner's counsel would surely have raised this crucial issue at the appeals oral argument hearing February 6, 1979. It should be noted Petitioner's attorney was not present at this hearing, instead was a Dallas judge at that point in time.

CONCLUSION

Subsequent to the appeals court ruling, Petitioner has contacted a number of attorneys, and necessarily the matter of Petitioner's appeal lawyer arguing before the Texas Court of Criminal Appeals on Petitioner's behalf, at a time when his attorney was a judge, came up. Without exception, they were indignant and one lawyer in particular probably summed up their feelings by declaring that, "no judge would do something like that." It's highly unlikely that Petitioner's appeal attorney did not make every possible attempt to secure counsel for Petitioner prior to being sworn in as judge. But the exceptional circumstances, and the controversy surrounding this cause with Petitioner having run as a controversial candidate for Sheriff, simply made the task impossible. In his conversations with other attorneys, Petitioner was not asked to reveal his appeal lawyer's identity.

Petitioner was not taken to an interrogation room prior to his trial, and forced to incriminate himself. But he was ordered to appear in a state courtroom with his evidence, and at that point his defense files were seized by agents of his political opponent. These files contained his personal notes and effects. In that sense, Petitioner was forced to incriminate himself. The fact that a thousand dollars was extorted subsequently, is not directly relevant to this cause. But it does reflect the intensity of the situation as it presented itself at the time. Clearly, Petitioner's due process rights, his rights to a fair trial, and his rights against self incrimination have been breached.

Respectfully submitted,

James A. Parker /s/

James A. Parker pro-se
6246 Lakeshore Dr.
Dallas, Texas 75214 821-9784
home
823-7510

Certificate of Service

A true copy of the foregoing mailed, postage-pre-paid to the 204th Criminal District Court, Dallas, Dallas County District Attorney's Office, Dallas, and the Texas Court of Criminal Appeals, Austin, Texas on August 10, 1979.

James A. Parker /s/

APPENDIX A

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas May 16, 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Pro Se Motion for Rehearing En Banc in Cause No. 56,543, James A. Parker

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

Thomas Lowe, Clerk

APPENDIX B

NO. 56.543

James A. Parker, Appellant	(	Appezl from Dallas County
	(	Texas and The Texas Court of
V.	(	
	(	Criminal Appeals to the Supreme
The State of Texas, Appellee	(	Court of the United States

Notice of Appeal

TO THE HONORABLE JUDGES OF SAID COURT:

Comes James A. Parker, with his Notice of Appeal, appealing the Opinion delivered March 14, 1979 by the Texas Court of Criminal Appeals, and the Motion for Rehearing denied May 16, 1979, and complaining his due process rights were denied, and appealing the conviction November 19, 1976 Cause F-76-8646-HQ, 204th Criminal District Court, Dallas, Texas.

Respectfully submitted,

James A. Parker /s/

James A. Parker, pro se
6246 Lakeshore Dr.
Dallas, Texas 75214 823-7510
821-9784 home

Certificate of Service

A true copy of the foregoing Notice has been mailed, Certified Mail, Return Receipt to The Texas Court of Criminal Appeals and the 204th Criminal District Court and the appeals section of the Dallas County, Texas District Attorney's Office on August 1, 1979.

James A. Parker /s/

FILED IN
Court of Criminal Appeals
Aug. 3, 1979

Thomas Lowe, Clerk

APPENDIX B

NO. 56.543

James A. Parker, Appellant	(	Appezl from Dallas County
	(	Texas and The Texas Court of
V.	(	
	(	Criminal Appeals to the Supreme
The State of Texas, Appellee	(	Court of the United States

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Respectfully submitted,

James A. Parker /s/

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821-9784 home

Certificate of Service

A true copy of the foregoing Notice has been mailed, Certified Mail, Return Receipt to The Texas Court of Criminal Appeals and the 204th Criminal District Court and the appeals section of the Dallas County, Texas District Attorney's Office on August 1, 1979.

James A. Parker /s/

FILED
August 2, 1979
Bill Shaw
District Clerk, Dallas Co. Texas

APPENDIX C

JAMES A. PARKER, Appellant
No. 56,543 v. --- Appeal from
THE STATE OF TEXAS, Appellee DALLAS County

OPINION

This is an appeal from a conviction for theft of service over $200.00. The penalty was assessed at 10 years' imprisonment and a $5,000.00 fine, but imposition of sentence was suspended while appellant was placed on probation.

Appellant's first two grounds of error, although couched in terms of "fatal variances," actually challenge the sufficiency of the evidence to sustain the judgment of conviction in this cause. His basic contentions under the two grounds of error are that (1) since the wife of the appellant and not the appellant signed the contract with Mohr Chevrolet, Inc. for the providing of a rental automobilt pending the repair of appellant's wrecked automobile, there is no evidence that the appellant entered into a rental agreement with Mohr Chevrolet, Inc. and (2) since appellant's wife signed the contract with Mohr Chevrolet, Inc., there is no evidence that the appellant ever secured any services from the complainant. The instant indictment charged appellant as follows:

> . . . JAMES A. PARKER on or about the 18th day of July (1975) . . ., did then and there unlawfully knowingly and intentionally secure by deception, a service from Earl Williams that the said James A. Parker knew was provided only for compensation, namely, the use of a 1975 Nova automobile, by entering into a rental agreement to pay cash for such service when he did not intend to, and did not, pay for same, and the value of such service was over $200.00 and under $10,000.00, . . .

V.T.C.A., Penal Code, Section 31.04(a) provided as follows:

> (a) A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation:
>
> (1) he intentionally or knowingly secures performance of the service by deception, threat, or false token; or
>
> (2) having control over the disposition of services of another to which he is not entitled, he intentionally or knowingly diverts the other's services to his own benefit or to the benefit of another not entitled to them.

It appears that the appellant was charged under Section 31.04(a) (1) and that the act constituting the deception was the "entering into a rental agreement to pay cash for such service when he did not intend to, and did not, pay for same, . . ."

The evidence, when reviewed in a light most favorable to the verdict rendered, reflects that on July 2, 1975, appellant's wife brought a damaged 1975 Camaro into Mohr Chevrolet, Inc. for purposes of obtaining estimates on the cost of repairing the damage to the auto. On July 18, 1975, appellant called one Earl Williams, manager of the body shop of Mohr Chevrolet, Inc. and the employee of that company who had authority for the renting of vehicles. The appellant inquired about the rental of a vehicle and was informed that 1975 Chevrolet Novas were available for a rental period of one week at a cost of $10.00 per day plus tax. The appellant informed Williams that those terms were agreeable with him and that his wife would deliver the damaged Camaro and would pick up the rental vehicle at the same time. Written rental agreements were entered into evidence as State's Exhibits 3 and Defense Exhibit 6. Both exhibits show that the rental agreements were in the name of the appellant, although the customer's signature was that of Mrs. Hope G. Parker, appellant's wife. Williams testified that he made several efforts in person and over the telephone to have the appellant return the vehicle after the expiration of the one-week rental period to no avail. A Mr. Dillon, credit manager for Mohr Chevrolet, Inc., testified that the matter of the overdue rental vehicle was brought to his attention on September 20, 1975, and at that time called the appellant to request that the vehicle be returned. The appellant responded that the witness would have to go to court in order to obtain the vehicle. On September 23, 1975, the witness sent to the appellant a letter of formal demand for the return of the vehicle by way of certified mail, return receipt requested. A copy of the letter and the return receipt was introduced into evidence. The vehicle was not returned and no payment of the existing debt was made within 10 days thereof. The witness then brought the matter to the attention of the Dallas County District Attorney's office who presented the case to the grand jury on October 24, 1975. The vehicle was repossessed by the Dallas County Sheriff's Office on November 5, 1975. Documentary evidence introduced by both the State and the appellant confirmed the telephonic agreement between the appellant and Mohr Chevrolet, Inc., through its agent, Earl Williams, that a 1975 Chevrolet Nova automobile would be rented at a rate of $10.00 per day, plus tax, for a period of one week, for cash.

The evidence is clearly sufficient to sustain the judgment of conviction against the appellant.

As to the specific allegations of fatal variances, we note that a rental agreement need not necessarily be in writing and signed by the defendant in order for an offense under V.T.C.A., Penal Code, Section 31.04(a)(1) to be committed. The written rental agreements in the instant cause merely provide documentary evidence corroborating the telephonic agreement reached between the appellant and Mohr Chevrolet, Inc. and its agent, Earl Williams. The trial court did not err in overruling the appellant's amended motion for new trial alleging that there is no evidence showing that the appellant entered into a rental agreement with Mohr Chevrolet, Inc. Appellant's first ground of error is overruled.

As stated above, the evidence is sufficient to establish that the appellant did indeed secure the service which consisted of Mohr Chevrolet, Inc.'s supplying a motor vehicle to the appellant for his use. The trial court did not err in overruling appellant's allegation in his amended motion for new trial that there was no evidence that he procured any service from the complainant. Appellant's second ground of error is overruled.

Appellant's third ground of error complains of the trial court's denial of appellant's amended motion for new trial which alledged that new evidence in the nature of a tape recording of a telephonic conversation between the appellant and "the State's key witness" was not introduced because of the ineffectiveness of appellant's trial counsel. It is noted that the appellant represented himself. Appellant relies on Article 40.03(6), V.A.C.C.P. That provision of our Code of Criminal Procedure provides that a new trial be granted when new and material evidence is discovered since the trial of the cause. The allegations in appellant's amended motion for new trial destroy the merit, if any, of appellant's ground of error. It is noted that the tape recording was clearly available to the appellant at the time of trial. Meyers v. State, 527 S.W.2d 307. Appellant's third ground of error is overruled.

Appellant's fourth ground of error complains that the trial court erred in denying his amended motion for new trial which alleged that the State's key witness committed perjury in the course of his testimony against the appellant. The appellant relies on Williams' testimony when recalled a second time by the appellant. On direct examination and during a large part of the cross-examination, the witness Williams testified that appellant called him on July 18, 1975, to arrange for the rental of a vehicle for a period of one week. Both State's Exhibit 3, a copy of the rental agreement held by the complaintant, and Defendant's Exhibit 6 show that "1 (week)" is inserted in a space marked "when returned."

The witness testified that it was standard procedure for him to insert in that space the duration of the rental period agreed upon. He stated that this as well as the name, address, and other information pertinent to the rented vehicle was entered on the rental agreement after his conversation with the appellant over the phone and before appellant's wife signed the written rental agreement. After a lengthy examination, Williams stated that he did not exactly state that "this car was to be returned in one week." Further examination reflects the following:

> Q. You didn't tell me it was to be returned in one week?
>
> A. I don't recall the time when you were to have the car.
>
> Q. At any time during the July the 18th, 1975 conversation that you and I had over the phone did I tell you that I believed I would bring the car back in one week?
>
> A. I don't recall.
>
> Q. At any time during the conversation you had with my wife on July the 18th, 1975 in your office did she indicate to you she would bring the car back in one week?
>
> A. I think during the course of our conversation you said you would only need the car about a week. That's what the car was let out for: a week.
>
> Q. I don't quite understand what you said. Was it during the course of your conversation with her?
>
> A. Possibly with you too.
>
> * * *
>
> Q. Do you remember a conversation you had with me on July the 18th?
>
> A. Not definitely word for word in the conversation, no.

This testimony, when read in conjunction with the witness's entire testimony before the jury, does not constitute perjury. There was no other evidence introduced to establish appellant's allegation and the trial court did not err in overruling appellant's amended motion for new trial. Appellant's fourth ground of error is overruled.

Appellant's final ground of error complains of "comments" made by the prosecutors in their closing argument to the jury. The complained of argument reads as follows:

> And now the evidence in this case makes him out to be a liar. Which makes those statements to be utterly untruthful.

> because the witness we called, Mr. DuBois, had a little bit different story to tell you, didn't he?

When read in context, it is clear that the State was referring to the comments made by the appellant in his letter of August 1, 1976, to Mr. Dillon, the credit manager of Mohr Chevrolet, Inc. It was the State's deduction from the evidence that statements of appellant within the letter were untruthful. This is clearly a permissible line of argument to a jury. See Sloane v. State, 507 S.W.2d 747; Nichols v. State, 511 S.W.2d 269; cf Alejandro v. State, 493 S.W.2d 230. In addition, appellant did not object to the State's argument. Cain v. State, 549 S.W.2d 707. Appellant's fifth ground of error is overruled.

There being no reversible error, the judgment of conviction is affirmed.

PER CURIAM

(Delivered March 14, 1979)

By Panel No. 1, 1st Quarter
1979, composed of
John F. Onion, Jr., Presiding Judge
W. T. Phillips, Judge
Tom G. Davis, Judge